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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2010-CP-10-03410

Dr. Cynthia Holmes, M.D.

Appellant

v

East Cooper Community Hospital, Inc.
and Tenet Health System Medical, Inc.

Respondents

RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT CORRECTLY RULE THAT IT LACKS JURISDICTION TO REVIEW THE ACTIONS OF A PRIVATE HOSPITAL CONCERNING MEDICAL STAFF PRIVILEGES?

II. DID THE CIRCUIT COURT CORRECTLY HOLD THAT JUDGE DENNIS NEVER RULED ON THE MERITS OF RESPONDENTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND, IN THE ALTERNATIVE, DID THE CIRCUIT COURT CORRECTLY HOLD THAT SUCH A RULING IS NEITHER IMMEDIATELY APPEALABLE NOR THE LAW OF THE CASE?

III. DID THE CIRCUIT COURT CORRECTLY RULE THAT THE ORDERS GRANTING SUMMARY JUDGMENT TO RESPONDENTS AND SANCTIONING HOLMES IN THE 2005 LAWSUIT OPERATE AS RES JUDICATA AND/OR COLLATERAL ESTOPPEL, DID HOLMES APPEAL THIS RULING, AND IS HOLMES' FAILURE TO APPEAL THIS RULING THE LAW OF THE CASE?

STATEMENT OF THE CASE

Respondent East Cooper Community Hospital, Inc., a subsidiary of Respondent Tenet HealthSystem Medical, Inc., owns, operates and does business as East Cooper Medical Center ("Hospital"), a private, for-profit hospital in Mount Pleasant, South Carolina. Appellant Cynthia Holmes, M.D., ("Holmes") was a member of the consulting medical staff of the Hospital and practices ophthalmology in Sullivan's Island, South Carolina. **R. p.10, ¶4.** Although she has been in practice since 1994, she is not Board-certified in ophthalmology, does not have admitting or surgical privileges at any healthcare facility and, upon information and belief, has not performed surgery in any hospital or accredited surgical facility since 1998. **R. p.671, ¶14; pp.678-79, ¶18; p.696 ¶15; p.702; p.705, §15; Supp. R, p.21, ¶16.** Holmes is also a licensed member of the South Carolina Bar, who practices law under her alias, Cynthia Collie, Esquire.

The present appeal arises from a complaint filed by Holmes against the Respondents on April 26, 2010, requesting that the circuit court review the Hospital's

privileging decisions with respect to medical staff reappointment applications made by Holmes in 2006 and 2008. **R. pp.10-14.** In 2006, the Hospital denied Holmes' application for advancement in staff category and for privileges to perform surgery on the eye. **R. pp.679-80, ¶¶19-20.** In 2008, the Hospital deemed Holmes' application for reappointment to the medical staff, advancement in staff category, and privileges to perform surgery on the eye incomplete. **R. pp.695-97, ¶¶14-17.**

On September 17, 2010, Respondents filed an Answer denying liability, raising several affirmative defenses, and counterclaiming against Holmes for abuse of process, malicious prosecution, and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"). **R. pp.15-31.** On September 24, 2010, respondents moved for judgment on the pleadings. **R. pp.635-36.** The circuit court held a hearing on December 16, 2010, and orally denied the motion solely on the basis that the motion would be more appropriately considered and reviewed on appeal at the summary judgment stage. **R. pp.591:12-593:2.** Respondents moved to reconsider (**R. pp.658-61**), and the circuit court denied this motion by form order filed on March 9, 2011. **R. p.1.**

On June 6, 2011, Respondents moved for summary judgment on several grounds, including the circuit court's lack of subject matter jurisdiction to review the privileging decisions of a private, for-profit hospital. **R. pp.663-65.** Respondents also contended that the present lawsuit was barred under the doctrines of res judicata and collateral estoppel, since Holmes had litigated and lost an almost identical lawsuit against Respondents based on the Hospital's 2002 and 2004 privileging decisions. **R. pp.663-65.** Holmes was sanctioned for her frivolous arguments in the previous lawsuit, and this Court dismissed her multiple appeals attempting to challenge the circuit court's

previous decisions. **R. pp.197-214.**

On July 8, 2011, The Honorable Kristi Lea Harrington held a hearing on Respondents' motion for summary judgment. **R. p.594.** On July 29, 2011, Judge Harrington entered an order granting summary judgment to the Respondents, recognizing that the circuit court lacked subject matter jurisdiction to review the Hospital's privileging decisions with respect to Holmes. **R. pp.2-9.** Judge Harrington also held that the orders granting summary judgment to respondents and sanctioning Holmes in the previous lawsuit operated as res judicata and/or collateral estoppel against Holmes in the present lawsuit.¹ **R. p.8, note 1.** On August 24, 2011, Holmes appealed the circuit court's order granting summary judgment to the Respondents. **R. p.1436.**

FACTS

On April 26, 2010, Holmes filed her *fourth* lawsuit against Respondents East Cooper Community Hospital, Inc. and Tenet Healthsystem Medical, Inc. (collectively "Respondents") alleging breach of contract and breach of a covenant of good faith and fair dealing arising out of her medical staff status and privileges at the Hospital. **R. pp.10-14.** In the present lawsuit, *as in a prior one*, Holmes contended that the Respondents breached a settlement agreement arising from a third lawsuit by denying her request for advancement in medical staff category and surgical privileges. **R. pp.10-**

¹ In their motion for summary judgment, Respondents also contended that they were entitled to summary judgment because, as a matter of law, they complied with the plain language of the medical staff bylaws and because Respondents are entitled to immunity from this suit under state and federal law. **R. pp.1217-35.** The circuit court did not rely on these alternative sustaining grounds in its order granting summary judgment to Respondents. **R. pp.2-9.** As a result, and for the sake of brevity, Respondents have not reiterated these arguments herein, but would incorporate these grounds, including the arguments made in support thereof, herein by reference.

14; pp.237-52.

This argument was put to rest, or should have been, on May 23, 2007, when The Honorable R. Markley Dennis, Jr., granted summary judgment to Respondents in one of Holmes' previous lawsuits, unequivocally finding that the circuit court lacked jurisdiction to review the privileging decisions of a private, for-profit hospital. **R. pp.318-19.** On August 6, 2009, Judge Dennis reiterated this finding when he sanctioned Holmes under the South Carolina Frivolous Civil Proceedings Sanctions Act (the "Act"), codified at section 15-36-10 of the South Carolina Code, for, among other things, arguing that the circuit court had jurisdiction to review the privileging decisions of a private, for-profit hospital. **R. pp.210-12.** In the present case, Holmes has simply regurgitated allegations and arguments rejected in prior lawsuits. The same result should apply here.

As set forth more fully *infra*, the record in this case substantiates that Holmes' causes of action in the present lawsuit arise from allegations and arguments which she included in previous lawsuits alleging the same causes of action against the same Respondents. **R. p.68, ¶30; p.172, ¶29; p.1290, ¶10; p.1293, ¶27; pp.1298-99.** Consequently, Respondents respectfully request this Court affirm the circuit court's order granting summary judgment to them in the current lawsuit.

The Previous Lawsuits

Holmes was initially granted medical staff privileges by the Hospital in January 1994. **R. p.62, ¶8.** In 1997, a dispute arose between Holmes and the Hospital over her staff category and privileges at the Hospital. **R. p.68, ¶¶29-30.** Consequently, Holmes filed a federal lawsuit against the Respondents and others arising from this dispute, alleging, *inter alia*, that Respondents breached a contract by their application of the

Medical Staff Bylaws to her application for medical staff privileges. **R. p.60; p.73, ¶¶54-57.**

The federal court granted summary judgment to Respondents on Holmes' claims arising under federal law and declined to exercise jurisdiction over her state law claims. **R. pp.51-73.** The Fourth Circuit Court of Appeals affirmed, and the United States Supreme Court denied certiorari review. Holmes later filed a legal malpractice action in state court against the attorneys who represented her in the federal lawsuit. **R. pp.164-77.** The Honorable Thomas L. Hughston, Jr., granted the defendants in the legal malpractice action a directed verdict and awarded them \$200,000.00 in sanctions against Holmes under the Act. **R. pp.215-27.**

In 2000, Holmes filed an action in state court against the Respondents and others, again alleging that the Respondents breached a contract in their application of the Medical Staff Bylaws to Holmes' application for medical staff privileges. **R. p.110; p.123, ¶¶50-53.** On October 28, 2002, the parties reached a settlement, which included Holmes' reappointment to the consulting category of the medical staff for a two year term beginning in December 2002. **R. pp.53-57.** The agreement consummating the settlement of this lawsuit (the "Settlement Agreement") provides, in pertinent part: "Dr. Holmes shall have the right to apply for a change in status in accordance with the Bylaws." **R. pp.53-54.** Holmes alleged this provision in the Settlement Agreement was breached in a 2005 lawsuit (**R.pp.241-245**), discussed *infra*, as well as in the current lawsuit. **R. p.12-13, ¶¶6, 12.**

Holmes also sued the attorneys who represented her in the lawsuit filed in state court in 2000 against Respondents. **R. pp.179-95.** On December 2, 2009, the Supreme

Court of South Carolina issued an Order denying Holmes' petition for certiorari in an appeal of that lawsuit, explaining: "[T]his action is just one in a number of frivolous actions petitioner has filed relating to the revocation of her medical staff privileges at East Cooper Community Hospital *in 1997.*" **R. pp.233-35** (emphasis in original). "Because we find the petitioner has engaged, and continues to engage in, vexatious litigation related to that issue, we hereby direct the Clerks of Court in this state to refuse to accept further filings from petitioner in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, other than petitioner, licensed to practice law in this state." **R. pp.233-35**. In a footnote, the Court quoted extensively to Judge Hughston's Order sanctioning Holmes in her first legal malpractice lawsuit, referenced above, as follows:

Throughout the history of this case, Dr. Holmes has proven herself to be profoundly litigious. Since being assigned to Courtesy Staff at East Cooper Hospital in 1997, Dr. Holmes engaged in a lengthy, albeit fruitless, administrative appeal of the Hospital's decision. She then sued the Hospital in federal court, and failing there, in state court. She sued Mr. Becker and Mr. Grier and their law firm over the handling of the federal case. She sued two Tennessee lawyers in both South Carolina and Tennessee state courts over their role in achieving a settlement of her state court case against the Hospital. In 2005, Dr. Holmes sued the Hospital in a second action, alleging a wide array of complaints against the Hospital and several physicians, the gist of which was that the Hospital continued to refuse to increase her level of privileges. In Dr. Holmes' 2005 case against East Cooper Hospital, which the Court deemed to be barred by her settlement of the 2000 case, the Court imposed a \$90,000 sanction for violation of the [South Carolina Frivolous Civil Proceedings Sanctions] Act. In each of the cases Plaintiff has filed *pro se* since settling her 2000 state court case against East Cooper Hospital, Plaintiff has asserted baseless and frivolous claims for which she lacked any evidentiary support. She has launched numerous pointless appeals, every one of which has been resolved in favor of

the respondents. Throughout, Plaintiff has made baseless, maybe scandalous, allegations against numerous physicians and lawyers without care, and in absence of evidentiary support. Her tactics have been dilatory, vexatious, that is brought without sufficient grounds, oppressive and unreasonable.

Plaintiff's conduct through the case appears to have been nothing but vexatious, that is, brought without sufficient grounds, and the maintenance of this completely frivolous claim can only be characterized as unreasonable. As before, Dr. Holmes was the losing party in a lawsuit a decade ago. She has persisted in pursuing this case for nearly a decade yet has never adduced a shred of evidence that anything the Defendants did made any difference in the outcome of the federal court action about which she complains.

Clearly, Plaintiff has abused the judicial system generally, and these Defendants in particular, with her unreasonable and ill considered frivolous lawsuit. Throughout this matter, and in her other cases, Dr. Holmes has repeatedly shown that she is unwilling and unable to evaluate the merits of her own cases, and that she is unable to present any evidence to support her claims. She has evidenced a pattern of abusing the legal process in bringing frivolous actions and the potential remains for her to continue that practice unless severe sanctions are levied against her.

R. p.233-34, note 2. In another footnote, the Supreme Court specifically pointed to Cynthia Holmes, M.D. v. East Cooper Community Hospital, Inc.; Tenet Healthsystem Medical, Inc.; John Grady, M.D.; Paul Yantis, M.D. (2005-CP-10-5113) as one of Holmes' frivolous lawsuits. **R. pp.233-35, note 3.**

In 2005, Holmes filed a complaint, designated as Case No. 2005-CP-10-5113, against Respondents and others, concerning her 2002 and 2004 reappointments to the Hospital's Medical Staff. **R. p.237; pp.239-40, ¶15.** In the 2005 lawsuit, her third against the Respondents, Holmes filed a cause of action for breach of contract, alleging not only that the Respondents breached its Medical Staff Bylaws during these reappointments

(**R. pp.241-42**), but also that these reappointments were in breach of the Settlement Agreement (**R. p.251**). Her counsel in the current appeal, Chalmers C. Johnson, also represented her in the 2005 lawsuit. **R. p.250**.

Judge Dennis initially dismissed all claims in the 2005 action arising from Holmes' 2002 application because these claims had been resolved in the Settlement Agreement. **R. pp.262-65**. Judge Dennis later granted summary judgment to the Respondents on Holmes' remaining claims regarding her 2004 reappointment. **R. pp.316-22**. Judge Dennis held that the circuit court lacked jurisdiction to consider the privileging decisions of a private, for-profit hospital and, in any event, Holmes failed to produce evidence sufficient to create a genuine issue of material fact as to any of her claims. **R. pp.318-19**. Holmes filed multiple, redundant appeals of this order, and the South Carolina Court of Appeals dismissed and remitted Holmes' appeals three separate times. **See R. pp.228-32; Supp. R., p.1**.

Judge Dennis also sanctioned Holmes in the 2005 action pursuant to the Act, awarding the defendants therein \$90,000.00 in attorneys' fees. **R. pp.215-27**. Holmes' appeal of the order sanctioning her was also dismissed and remitted by the South Carolina Court of Appeals.

The Current Lawsuit

On April 26, 2010, Holmes filed the present lawsuit claiming, yet again, that the Respondents breached the Settlement Agreement and, yet again, asking that the circuit court review the credentialing decisions the Hospital has made regarding her medical staff privileges. **R. pp.10-14**. Respondents answered the complaint and asserted several affirmative defenses and counterclaims. **R. pp.15-31**.

Respondents moved for judgment on the pleadings, raising, among other things, the circuit court's lack of subject matter jurisdiction. **R. pp.635-36**. On December 16, 2010, Judge Dennis held a hearing on the motion and ruled that the motion was premature. **R. pp.591:12-593:2**. In so ruling, Judge Dennis specifically explained that he was not ruling on "anything about the merits." **R. pp.592:25-593:2**. Respondents moved to reconsider Judge Dennis's decision that the motion was premature (**R. pp.658-61**), and Judge Dennis denied that motion, as well (**R. p.1**). Contrary to Holmes' contention in the present appeal, Judge Dennis never addressed the merits of the Respondents' motion to dismiss on the grounds of subject matter jurisdiction.

On July 29, 2011, Judge Harrington granted summary judgment to Respondents, ruling, as Judge Dennis had in the 2005 lawsuit, that the circuit court lacked jurisdiction to review the privileging decisions of a private, for-profit hospital. **R. pp.2-9**. While Holmes contends, as she had in the 2005 lawsuit, that she was alleging a breach of the Settlement Agreement, not a breach of the Bylaws, Holmes submitted three (3) affidavits in opposition to summary judgment, all of which asserted that the Hospital breached the Bylaws and essentially ignored Holmes' supposed claims regarding the Settlement Agreement. See, e.g., **R. pp.1271-74, ¶¶5-12**. As Judge Harrington recognized in her order granting summary judgment to Respondents:

[T]he Affidavit of Plaintiff's expert witness contains a lengthy discussion and interpretation of the Bylaws, but omits any reference to the subject Settlement Agreement. This Affidavit unequivocally shows the Plaintiff's claims are dependent upon the issue of whether the Hospital properly applied the Bylaws in reviewing the Plaintiff's 2006 and 2008 reappointment applications, as this is the sole basis on which the expert opines. None of the evidence or testimony submitted by the Plaintiff demonstrates a genuine issue of material fact as to whether the subject Settlement

Agreement was breached, but, rather, only challenges the decisions regarding her peer review processes.

R. p.7. Judge Harrington also ruled that Judge Dennis's prior orders granting summary judgment to Respondents and sanctioning Holmes supported summary judgment against Holmes in the present case on the grounds of res judicata and/or collateral estoppel. **R. p.8, note 1.**

On August 8, 2011, Respondents filed a motion for sanctions, reiterating the grounds for the motion raised in their answer to the Plaintiff's complaint. **Supp. R. pp.22-23.** On or around August 24, 2011, Holmes filed the present appeal. **R. p.1436.** On February 1, 2012, Judge Harrington granted Respondents' motion for sanctions. **Supp. R. pp.3-20.**

STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Id. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). With respect to an issue upon which the nonmoving party bears the burden of proof, this

initial responsibility may be discharged by “showing”-that is, pointing out to the trial court-that there is an absence of evidence to support the nonmoving party’s case. Id. The moving party need not support its motion with affidavits or other similar materials *negating* the opponent’s claim. Id. Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial. Id.

“[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” David, 367 S.C. at 250, 626 S.E.2d at 5. “A complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” Gauld v. O’Shaughnessy Realty Co., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008).

“The question of subject matter jurisdiction is a question of law for the court, not a jury question.” Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631, 631 (Ct. App. 1993). “If the facts which give rise to a jurisdictional issue are in dispute, the court, not a jury, must find the facts.” Id. Likewise, “[t]he construction of a clear and unambiguous contract presents a question of law for the court.” S.C. Dep’t of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

LAW/ANALYSIS

I. The circuit court correctly ruled that it lacks jurisdiction to review the actions of a private hospital concerning medical staff privileges.

As Judge Harrington recognized in her order granting summary judgment to the Respondents: “[T]he Plaintiff’s claims all arise out of the peer review process at the Hospital and, as such, are not subject to judicial review.” **R. p.6.**

“Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” Metts v. Mims, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009). “Claims of lack of subject matter jurisdiction may be raised at any time, and subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court.” Eldridge v. City of Greenwood, 331 S.C. 398, 408, 503 S.E.2d 191, 196 (Ct. App. 1998).

“It is well settled in South Carolina, and throughout the country, that it is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners.” Wood v. Hilton Head Hosp., Inc., 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987). Thus, “the implementation of the regulations of a private hospital which are initiated to restrict a practitioner’s practices are not subject to judicial review.” Id.; Gowan v. St. Francis Cmty. Hosp., 275 S.C. 203, 204, 268 S.E.2d 580, 581 (1980) (“Here we are not persuaded respondent’s implementation of such regulations to the restriction of appellant’s practice in its hospital requires us to depart from the long-standing principle that such action is not subject to judicial review.”); see also Strauss v. Marlboro County Gen. Hosp., 185 S.C. 425, 194 S.E. 65, 65 (1937). (“It is conceded, we understand, that if Marlboro County General

Hospital is a private institution, the action must fail and the appeal be dismissed.”).

Holmes does not dispute that the Hospital is a private, for-profit hospital. Further, as Judge Harrington recognized, “the Plaintiff’s Complaint and the evidence in the record clearly show she is indeed seeking a judicial interpretation of the Hospital’s implementation of its Medical Staff Bylaws and of the decisions regarding her Medical Staff Privileges.” **R. p.6**. One need not go beyond Holmes’ complaint to confirm that her claims would necessitate that the Court review the Hospital’s 2006 and 2008 privileging decisions with respect to Holmes in order to grant her any relief. In fact, Holmes’ entire lawsuit is grounded upon the following allegation: “Defendants breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision *to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws.*” **R. p.12, ¶14** (emphasis added). Holmes proceeds to allege: “The Credentials Committee then denied the Plaintiff’s application, an act which should have given Plaintiff the right to pursue an appeal, *under the applicable bylaws.*” **R. p.12, ¶16** (double emphasis added).

Likewise, the affidavits relied upon by Holmes in opposing summary judgment confirm that Holmes seeks a judicial review of the Hospital’s privileging decisions rather than the Settlement Agreement. For example, the affidavit of Dr. Shershow, Holmes’ purported expert witness, includes a lengthy discussion and interpretation of the Hospital’s Medical Staff Bylaws, but does not even mention the Settlement Agreement. **R. pp.1271-74, ¶¶5-12.**

Moreover, while Holmes appears to contend that the Settlement Agreement somehow conferred subject matter jurisdiction on the circuit court to review the

Hospital's future privileging decisions, this allegation should be roundly rejected for alternative reasons. First, nothing in the plain language of the Settlement Agreement purports to confer subject matter jurisdiction on the circuit court to review future privileging decisions of the Hospital. See pp.52-57. See, e.g., Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) ("A release is a contract and contract principles of law should be used to determine what the parties intended."); Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) ("If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.").

Second, even if the Settlement Agreement unambiguously stated that the parties consented to the circuit court reviewing the Hospital's future privileging decisions (which it does not), the agreement would be void and of no effect because parties cannot, by contract or otherwise, confer subject matter jurisdiction on a court. See, e.g., GNOC Corp. v. Estate of Rhyne, 312 S.C. 86, 88, 439 S.E.2d 274, 275 (1994) ("The question of lack of subject matter jurisdiction may be raised at anytime during the action and *cannot be waived or conferred by consent.*") (emphasis added); 20 Am. Jur. 2d Courts § 95 ("In general, the jurisdiction of courts is a public matter that cannot be affected by a private agreement, and the jurisdiction of a court can neither be acquired nor lost as a result of an agreement of the parties."); 21 C.J.S. Courts § 84 ("[A]s a general rule, where the court has no jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, contract, stipulation, or by other conduct or action of the parties.").

Holmes also misinterprets the existing case law. Without citing any legal

authorities in support of her position, Holmes argues in favor of a circumscribed interpretation of Strauss, Gowan, and Wood, contending that these cases narrowly restrict the circuit court's ability to review a private hospital's bylaws on procedural due process grounds. Even a cursory review of the cases cited in Judge Harrington's order granting summary judgment to Respondents reveals that this is simply not the case.

To the contrary of Holmes' argument, each of these cases involved a medical practitioner-plaintiff who sought judicial review of a hospital's decision regarding his medical staff privileges at the hospital. See Strauss, 185 S.C. at 425, 194 S.E. at 65 ("The appellant brings his action alleging that the trustees have adopted certain rules which deprive him, as a duly licensed physician, of the privilege and opportunity of practicing surgery in this hospital"); Gowan, 275 S.C. at 204, 268 S.E.2d at 581 ("Appellant James B. Gowan, a licensed medical practitioner certified by the American Board of Family Physicians, was denied certain specialized privileges by respondent St. Francis Community Hospital, a private corporation."); Wood, 292 S.C. at 404, 356 S.E.2d at 841 ("Appellant's medical staff privileges were summarily suspended by the Executive Committee of the Hospital's Board of Trustees pursuant to a provision in the By-Laws").

In Gowan, the state Supreme Court expressly advised against judicial interference with the hospital's decision to deny a physician's request for privileges, not just with the process set forth in the medical staff bylaws: "Here we are not persuaded respondent's implementation of such regulations to the restriction of appellant's practice in its hospital requires us to depart from the long-standing principle that such action is not subject to judicial review." Id. at 204, 268 S.E.2d at 581. In Wood, this sentiment

was stated even more strongly: “[I]t is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners.” Id. at 405, 356 S.E.2d at 842. Put simply, there is no intent in any of these cases to restrict the Court’s ruling to due process claims, the express holding in Wood is inapposite to such an interpretation, and Holmes points to no contrary precedent or other authority in support of her position in this regard.

Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 7-9, 344 S.E.2d 379, 380-81 (Ct. App. 1986) also affords no relief to Holmes. As Judge Harrington recognized: “Lee applies only to actions for civil conspiracy, not claimed herein, rather than causes of action sounding in contract.” **R. p.7.** In Lee, the plaintiff filed a cause of action against the hospital and others alleging that individual members of the hospital’s medical staff conspired to injure the plaintiff in denying his application for medical staff privileges. Id. The defendants demurred to the complaint, and the circuit court overruled the demurrers. Id.

On appeal, the Court of Appeals initially emphasized that the hospital’s decision was not ordinarily subject to judicial review: “We agree that a private hospital is free, in the absence of controlling legislation or regulatory provisions, to decide the nature and extent of medical practice permitted to persons it grants staff privileges.” Id. at 9, 344 S.E.2d at 381. “Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review.” Id.

Nevertheless, the Court of Appeals carved out a narrow exception to this rule, recognizing that the court could review whether the decision of the hospital was being “imposed in furtherance of a conspiracy, the primary purpose of which was to injure the

plaintiffs.” Id. at 10, 344 S.E.2d at 381. “If the complaints, liberally construed, allege such a conspiracy, it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review.” Id.

In the present case, unlike in Lee, there is no allegation, much less sufficient evidence to survive summary judgment, that the Hospital denied Holmes’ privileges in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiff. While Holmes now argues for an expansion of Lee beyond the civil conspiracy context, the express terms of Lee state that the circuit court will not have jurisdiction to review the privileging decisions of a private hospital in the “ordinary” case, and Holmes fails to cite to any case law in South Carolina or any other jurisdiction supporting such an expansion.

To reiterate, the Supreme Court of South Carolina has clearly stated: “[I]t is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners.” Wood, 292 S.C. at 405, 356 S.E.2d at 842. This holds true regardless of whether there is a contract providing otherwise. Notably, the Settlement Agreement does not provide otherwise in this case. Accordingly, Judge Harrington’s ruling that the circuit court lacks jurisdiction to review the Hospital’s denial of Holmes’ medical staff privileges in 2006 and 2008 should be affirmed.

II. The circuit court correctly held that Judge Dennis never ruled on the merits of Respondents’ motion to dismiss for lack of subject matter jurisdiction and, in any event, such a ruling is neither immediately appealable nor the law of the case.

As Judge Harrington emphasized, “the Plaintiff’s contention that this Court has previously ruled on and agreed to accept subject matter jurisdiction of this controversy

are without merit.” R. p.8.

While Respondents’ initially raised the issue of the circuit court’s lack of subject matter jurisdiction in the form of a motion for judgment on the pleadings, Judge Dennis heard the motion and denied it as premature, specifically explaining that he was not ruling on “anything about the merits.” R. pp.591:12-593:2. Respondents moved to reconsider Judge Dennis’s decision that the motion was premature (R.pp.658-61), and Judge Dennis denied that motion in a form order (R. p.1).

In addition, while Holmes contends on appeal that Judge Dennis’s denial of Respondents’ motion for reconsideration adjudicated the merits of the subject matter jurisdiction issue, it is well-recognized that the denial of a motion to dismiss based on a lack of subject matter jurisdiction has no real finality, is not immediately appealable, and may still be maintained at trial. See Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993) (“The denial of Carlton’s motion to dismiss has no real finality, and any defense to personal jurisdiction can still be maintained at trial. We, therefore, hold that the denial of a motion to dismiss under Rule 12(b)(2), SCRPC, is interlocutory and not directly appealable.”); Deskins v. Boltin, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) (“The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable.”); Huntley v. Young, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (“The denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case. Since the order denying the Rule 12(b)(6) motion does not finally decide any issue, it is not directly appealable.”).

III. The circuit court correctly ruled that the orders granting summary judgment to Respondents and sanctioning Holmes in the 2005 lawsuit operate as res judicata

and/or collateral estoppel. Holmes did not appeal this ruling, which is the law of the case.

Judge Harrington held, in pertinent part: “[A]t least two prior orders entered by The Honorable R. Markley Dennis, Jr., in a previous case between these parties operate as *res judicata* and/or collateral estoppel as to this issue, and these also support the Court’s decision herein.” **R. p.8, note 1.** This alternative sustaining ground was never appealed by Holmes. As such, it is the law of the case. See Anderson v. Short, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (recognizing that, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

This ruling should also be affirmed on its merits. In the 2005 lawsuit against Respondents, as in the instant matter, Holmes alleged, among other things, that the Hospital breached the Settlement Agreement in its review of her applications for medical staff privileges. **R. p.251.** Nevertheless, Judge Dennis granted summary judgment to the Respondents, recognizing that the circuit court did not have jurisdiction to review the Hospital’s 2002 and 2004 privileging decisions with respect to Holmes. **R. pp.318-19.** Judge Dennis also sanctioned Holmes for her frivolous argument on this point. **R. pp.210-12.** Holmes’ multiple appeals of these orders were all ultimately dismissed and remitted by the South Carolina Court of Appeals.

“In a subsequent suit between the same parties on a different claim, the former judgment is conclusive as to those issues actually determined in the prior action.” Pye v. Aycock, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997). “A plea of *res judicata* applies to those matters actually adjudicated in the former action.” Id. “Under the

doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” Carman v. S.C. Alcoholic Beverage Control Comm’n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994).

In her 2005 lawsuit against the Respondents, Holmes alleged that the Respondents breached a contract and a covenant of good faith and fair dealing in considering her 2002 and 2004 applications for medical staff privileges. **R. pp.243-46.** The allegations relating to these causes of action in the 2005 lawsuit are almost identical to the allegations supporting her present lawsuit:

| <u>2005 Lawsuit</u> | <u>2010 Lawsuit</u> |
|--|--|
| The Plaintiff and Defendant [sic] were and are parties to a contractual agreement, the terms of which are set forth in the Medical Staff Bylaws, Rules, Regulations, and related documents. R. p.240, ¶¶19; pp.243-44, ¶¶ 30(1), 31(2). ² | The Plaintiff and Defendant [sic] were and are parties to a contractual arrangement, the terms of which are set forth as part of a settlement agreement. R. p.12, ¶12 |
| As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing. R. p.244, ¶32(2) | As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing. R. p.12, ¶13 |
| That the Defendant [sic] breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges by claiming, fraudulently, that Plaintiff’s application for privileges was incomplete, when it was not. R. p.244, ¶33(2) | That the Defendant [sic] breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws. R. p.12, ¶14 |
| In 2002 and 2004 (in each of the two years), Plaintiff submitted an application | In 2006-2007 and 2008-2009 (in each of two years), Plaintiff submitted an |

² Holmes’ Amended Complaint in the 2005 lawsuit includes two separate paragraphs labeled 30, 31, 32, 34, and 36. The parenthetical next to the referenced paragraph indicates whether the citation is to the first such paragraph (1) or the second (2).

| | |
|--|---|
| for advancement in staff privileges, which was complete on its face. R. p.244, ¶34(2) | application for advancement in staff privileges, which was complete on its face. R. p.12, ¶15 |
| The Credentials Committee then denied the Plaintiff's application, an act which should have given Plaintiff the right to pursue an appeal, under the Contract. R. p.244, ¶36(2) | The Credentials Committee then denied the Plaintiff's application, an act which should have given the Plaintiff the right to pursue an appeal, under the applicable bylaws. R. p.12, ¶16 |

With respect to her allegation in the 2005 lawsuit that Holmes and the Respondents were parties to a contractual agreement “the terms of which are set forth in the Medical Staff Bylaws, Rules and Regulations, *and related documents*,” Holmes later confirmed in the 2005 lawsuit that these “related documents” included the Settlement Agreement—the same contract she alleges was breached in the present case:

The defendant [sic] claims that *a settlement agreement executed by the parties* which required that the Plaintiff be reappointed to the consulting staff in 2002 precludes Plaintiff from suing in this case because she was, actually, reappointed to the consulting staff in 2002. The Defendant [sic] misinterprets the complaint, which should be clear on its face. *Plaintiff was given two rights under the former agreement.* One was to be reappointed to the consulting staff in 2002 for two years. *The other, as Defendant [sic] explains in its own brief, was that the Plaintiff would have the right to apply for a change in status pursuant to the by-laws. It is the denial of the Plaintiffs right to apply for a change in status pursuant to the by-laws which is the basis of her claims in this case.*

R. p.251 (double emphasis added).

As previously discussed, in the 2005 lawsuit, Judge Dennis granted summary judgment to Respondents. **R. pp.316-22.** In addressing the allegations set forth above relating to Holmes' 2004 application, which are almost identical to the claims set forth in the current case relating to Holmes' 2006 and 2008 applications, Judge Dennis held, in

pertinent part:

The Plaintiff's Amended Complaint seeks judicial determination of whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws. Specifically, she requests the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The Plaintiff's claims all arise out of the peer review process at East Cooper Hospital and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and the Plaintiff has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.

R. p.319 (double emphasis added). As in this case, Judge Dennis also rejected Holmes' attempt to distinguish Lee:

The Plaintiff argues that the Court does not have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 334 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt the Plaintiff's interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. *Lee* at 10. Here the Plaintiff asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that *Strauss*, *Gowen*, and *Wood* decisions sought to prevent.

R. p.319 (double emphasis added). Holmes appealed this order to the South Carolina Court of Appeals three separate times, and the Court of Appeals dismissed and remitted the appeal each time.

Judge Dennis re-emphasized his ruling in a subsequent order sanctioning Holmes for litigating the issue:

Despite clear case law to the contrary, the Plaintiff filed this action seeking judicial determination of whether the decisions regarding her credentialing and privileges were reasonable and in compliance with the Hospital's Bylaws. Specifically, she sought the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The Plaintiff's claims all arose out of the peer review process and, under South Carolina law, are not subject to judicial review, and the Plaintiff presented no evidence or reason to persuade the Court to depart from this long-standing principle.

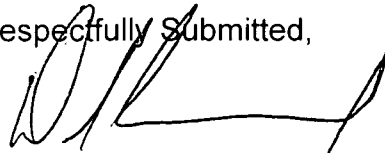
R. p.211 (double-emphasis added). This order was also appealed by Holmes. The Court of Appeals dismissed and remitted her appeal.

The present lawsuit is more of the same. Holmes alleges, as she did in 2005, that the Respondents breached the Settlement Agreement in reviewing her applications for medical staff privileges. **R. pp.10-14.** Judge Dennis considered this argument in the 2005 lawsuit and rejected it in two separate orders. **R. pp.197-214; pp.316-22.** The appellate courts effectively affirmed these orders. Based on the foregoing, Judge Harrington appropriately recognized that Holmes should not be permitted to re-litigate the issues of whether the circuit court has subject matter jurisdiction to review the privileging decisions of a private, for-profit hospital or whether the Settlement Agreement somehow confers subject matter jurisdiction on the circuit court when it otherwise lacks such jurisdiction. Accordingly, Judge Harrington's decision should be affirmed on this alternative sustaining ground.

CONCLUSION

The present lawsuit is a re-hash of previous lawsuits filed by Holmes against the Respondents. As in the 2005 lawsuit, this Court should affirm the circuit court's ruling that it lacks subject matter jurisdiction to review the Hospital's privileging decisions with respect to Holmes. This Court should also affirm the circuit court's ruling on the alternative sustaining ground that the issue of subject matter jurisdiction was litigated and decided against Holmes in the 2005 lawsuit. She cannot re-litigate the issue here. Based on the foregoing, the circuit court's order granting summary judgment to the Respondents should respectfully be AFFIRMED.

Respectfully Submitted,



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Charleston, South Carolina
July 23, 2012

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lea Harrington, Circuit Court Judge

Case No. 2010-CP-10-03410

Dr. Cynthia Holmes, M.D.,

Appellant,

v.

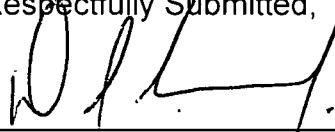
East Cooper Community Hospital, Inc.,
and Tenet HealthSystem Medical, Inc.,

Respondents.

RESPONDENTS' CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully Submitted,



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JUL 25 2012

S.C. Supreme Court

July 23, 2012

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Holmes v. East Cooper Comm. Hosp., Inc., et al.
Case No. 2010-CP-10-03410

Dear Mr. Shearouse:

Please find enclosed an original (unbound) and fifteen (15) copies of Respondents' Final Brief, Certificate of Compliance, and Proof of Service..

With warmest regards, I am,

PRATT-THOMAS WALKER, P.A.


Daniel S. McQueeney, Jr.

DSM:njd

Enclosures

C: (w/encl): Chalmers C. Johnson, Esquire

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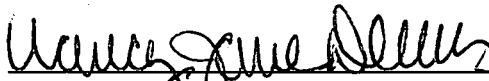
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PROOF OF SERVICE

I certify that I have served *Respondents' Final Brief* on Appellant Cynthia Holmes, M.D., by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2012, addressed to her attorney of record:

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Nancy Jane Dennis